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SUPREME COURT, U.S.

No. 06-1528

IN THE

Supreme Court of the United States

MATTHEW LEATH COCHRAN, FOREIGN AUTO PARTS OF MOBILE, INC., and PROFESSIONAL ENGINE SERVICE, INC.,

Petitioners,

v.

THE CINCINNATI INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

MICHAEL B. BEERS
WILLIAM F. PATTY*
ANGELA TAYLOR BAKER
BEERS, ANDERSON, JACKSON,
PATTY, VAN HEEST & FAWAL, P.C.
P.O. Box 1988
Montgomery, Alabama 36102
(334) 834-5311

* *Counsel of Record*

Counsel for Respondent

209257

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

There are no additional parties to the above styled action other than Petitioners, Foreign Auto Parts of Mobile, Inc., Professional Engine Service, Inc. and the Respondent, The Cincinnati Insurance Company.

The Cincinnati Financial Corporation is the parent corporation of The Cincinnati Insurance Company. No publicly held corporation owns 10% or more of The Cincinnati Financial Corporation's stock.

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STATEMENT OF THE CASE

A. Procedural History

In 1999, The Cincinnati Insurance Company (Respondent) filed a declaratory judgment action which sought to void the policies of insurance issued to Foreign Auto Parts of Mobile, Inc. and Professional Engine Service, Inc. (Petitioners) based on the arson and misrepresentation of Matthew Cochran (Cochran) [R1]. The case proceeded and in November of 1999, Cochran filed the first counterclaim against Respondent for breach of contract [R17].

In June of 2000, the proceedings were stayed pending the conclusion of Cochran's criminal trial for second degree arson regarding the fire at issue [R23]. The stay was lifted in December of 2001 [R27], the case proceeded. Respondent amended its complaint to add Petitioners as defendants [R47]. Summary judgment was granted in favor of Respondent in May of 2002 [R31, R.32, R 34, R35 and R37].

Pursuant to the District Court's request in December of 2002, Respondent filed a status report detailing the pending summary judgment claims [R66, R67 and R68] and Petitioners responded [R69]. A series of motions were filed by Petitioners [R70, R71, R73 and R78] which were all denied by the District Court; however, the Court allowed Petitioners to again file an amended answer or counterclaim [R84]. For the third time discovery was reopened and new deadlines were set [R84]. Petitioners again amended the counterclaims which alleged breach of contract, bad faith, misrepresentation, conspiracy and spoliation of evidence [R87]. After various filings, the District Court granted, in part, and denied, in part, Respondent's motion for summary judgment [R90, R91 and R116] and dismissed the counterclaims of misrepresentation and spoliation of evidence [R116].

On December 2, 2003, the District Court set the matter for a pretrial conference and a trial date of March 2, 2004 [R119].

The parties filed a jointly prepared proposed pretrial report on January 23, 2004 [R120]. Shortly thereafter, Respondent filed a motion to strike various triable issues set forth by Petitioners in the proposed pretrial order [R121]. Respondent argued various triable issues were not previously pled and were not the subject of discovery in the matter. Although Cochran pled guilty to 3rd degree arson, his conviction was not set aside until January 30, 2004, in light of a Rule 32 motion filed by the State of Alabama [R123, P. 9-11].[1]

On February 2, 2004, a pretrial conference was held [February 2, 2004 Minute Order] wherein Judge Hand required documentation as to the status of the criminal case and also allowed Petitioners to once again amend, for the third time, their counterclaims for clarification, in particular the allegations of conspiracy due to the contents of Petitioners' proposed pretrial order previously submitted [R122]. The case was stayed once again [R122]. In February of 2004, Petitioners amended their counterclaims which alleged new facts to support the same theories of conspiracy but it also included a newly pled counterclaim of malicious prosecution [R124]. The attorneys representing Respondent's at that time had no choice but to withdraw as counsel since the new allegations claimed the attorneys were part of conspiracy to deny insurance coverage [R135 and R136].

On March 3, 2004, the District Court referred the matter to a magistrate judge for the entry of a scheduling order for

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1. The basis of the Rule 32 motion was an affidavit provided by the previous prosecutor, George Hardesty, Jr. and information/documents provided to him by Cochran's attorney regarding Respondent's cause and origin expert, Harold Deese [R123, P.7-8]. Contrary to the assertion of Petitioners, Hardesty's affidavit is void of any affirmative statement that Hardesty definitely would not have tried the case at all had he known about the allegations of Deese's claimed unethical activities. The affidavit does state that had the information been known to him at the time it "would have very likely influenced" his "decision to prosecute the case and/or to call Harold Deese as a witness." [R123, P. 7-8].

discovery solely on the new factual issues raised in the amended counterclaims filed by Petitioners [R138]. By order of August 4, 2004, the District Court denied Petitioners' new motion for leave to amend their counterclaims to add co-conspirator defendants and new RICO claims [R 172 and R179]. On August 23, 2004, yet another scheduling order was entered.[2] [3] [R184]. On September 29, 2004, Respondent filed a motion to clarify [R194] the District Court's order of February 9, 2004 [R122] wherein Respondent questioned whether the newly added malicious prosecution counterclaim fell within the scope of the court's previous order which allowed for the amendment to the counterclaims on a limited basis [R194]. The purpose of court's order [R122] was to allow Petitioners the opportunity to clarify the allegations contained in the proposed pretrial order [R120] which was filed on January 23, 2004, particularly the conspiracy allegations, by amending their counterclaims. Petitioners filed a response in opposition based on the timeliness of the motion to clarify [R210].

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2. The discovery process was protracted and highly contentious. Petitioners filed discovery requests and motions compelling discovery that flatly were extremely unreasonable, untimely, contrary to the District Court's Orders staying discovery and that failed to comply with the FRCP. [R181; R184; R192; R193]. For example, Petitioners sought to compel depositions of Respondent's CEO before actually noticing it. For another example, Petitioners filed a motion to compel discovery when discovery was stayed. In these instances and others, Respondents and non-parties had to seek court assistance to stop Petitioners' discovery abuses.

3. Due to the abuses in the discovery process by Petitioners, on November 29, 2004, the District Court affirmed its prior order imposing monetary sanctions against Petitioners' counsel [R215 and R247]. Petitioners' counsel was also sanctioned in the U.S. District Court, Northern District of Florida, Panama City Div., Case. No. 5:05cv93/RV/MD regarding Petitioners' issuance and attempted enforcement of an invalid and patently unreasonable non-party subpoena to Harold Deese. Petitioners' counsel appealed the sanctions but this Court recently denied said Writ; specifically Case No. 06-1310.

On October 18, 2004, the District Court granted the motion to clarify by finding that: (1) Petitioners only attempted to object on the grounds that the motion to clarify was untimely; (2) Petitioners' "slight of hand" inclusion of the malicious prosecution claim in the amended counterclaim was outside the scope of what the court allowed in its previous order; and (3) that at the time of the filing of the proposed pretrial order on January 23, 2004, Matthew Cochran's criminal conviction had not yet be overturned so a malicious prosecution claim would not have been ripe for adjudication. The court struck the malicious prosecution claim [R216]. Petitioners requested the District Court to reconsider said order, or in the alternative, motion for leave to again amend the counterclaim [R226] which was denied [R228].

On March 1, 2005, Petitioners filed a Motion *In Limine* seeking to preclude any reference to the criminal investigation of Matthew Cochran [R 273].[4] Petitioners claimed evidence regarding any criminal investigation would "greatly protract the trial proceedings and be nothing more than a side show" for Respondent and would cause undue delay and waste of time. [R273]. The District Court granted, in part, Petitioners' motion insofar as it sought to preclude any reference to the fact that a criminal investigation was undertaken. Petitioners' motion was denied, in part, insofar as it sought to preclude testimony regarding evidence gathered during the course of the investigation that was relevant to the issues in this case, including whether the fire was caused by arson. [R274].

On March 7, 2005, the District Court granted Respondent's Motion *In Limine* [R240] precluding mention of the Spread Lounge fire, Deese's alleged altering of fire scenes/evidence and Attorney Richardson's knowledge of the Spread Lounge

4. Petitioners' Writ insinuates that an adversary ruling was made against them in denying their ability to present evidence regarding the outcome of the state criminal prosecution of Cochran. [Writ, p. 6]. The record is clear that the District Court granted Petitioners' own motion to exclude any mention of the criminal prosecution. [R274]

fire [R276]. Only after the entry of the court's order, Petitioners filed an objection [R281] to Respondent's motion limine regarding alleged prior bad acts of Harold Deese [R240].

On March 9, 2005, Petitioners filed a motion to amend/ correct [R282] the proposed pretrial order [R252] to include alleged newly discovered evidence and witnesses regarding allegations of Harold Deese altering fire scenes/evidence. The District Court, on April 15, 2005, entered an order which affirmed its prior order on the Spread Lounge fire [R276], granting Respondent's motion in limine [R286] regarding the 1991 Chickasaw fire and denied Cochrans' motion to amend/ correct [R282] the proposed pretrial order [R297]. In October of 2005, the District Court ruled that Matthew Cochran was not a proper counterclaim plaintiff and that Cochran could not maintain any alleged counterclaims against CIC. The order did not affect the claims pled by Petitioners [R337].

B. Statement of the Facts

The entirety of this brief could be consumed by corrections to all of the misstatements and mischaracterizations of facts contained in Petitioners' Writ. Portions of the Statement of the Case are correct but Petitioners take liberty with the facts and twists the actual facts into sinister allegations with self-serving commentary. Therefore, Respondent presents the following:

Respondent issued two fire insurance policies to Foreign Auto Parts of Mobile, Inc., providing coverage for the building, business personal property and loss of business income and a third policy to Professional Engine Service, Inc., regarding coverage for contents [R297, P. 2]. Matthew L. Cochran, the owner and officer of the two corporations, is not a named insured on the policies of insurance involved in this suit [R297, P. 3].

On November 11, 1998, a fire occurred at the location of 713 Holcombe Avenue, the site for Foreign Auto and Professional Engine. Both businesses are located under the same roof and the fire caused significant damage and loss to the

structure and the personal property located within the building [R297, P. 2-3].[5] The Court, in denying Petitioners' Motion for New Trial, concisely summarized the evidence before the jury:

> The critical factor in this case is the overwhelming evidence that defendant Cochran set the fire that damaged his businesses. The Court will not regurgitate details by now long familiar, but suffice it to say that an army of lay and law enforcement witnesses laid to bare Cochran's motive to commit arson, his intention and planning to do so, and his conduct - starkly inconsistent with innocence - on the night of November 11, 1998. Cochran did not aid his cause by offering flimsy explanations and bald denials of the wealth of evidence against him, nor by claiming to have witnessed a sudden burst of flame that even his own expert could not accept. His effort to turn the case into a battle of experts foundered on its own inherent implausibilities and could not in any event erase the mountain of damming evidence presented by disinterested witnesses.

[R366, P. 8-9].

The Jury had before it evidence of very serious and severe financial problems of the business as outlined by accountants - one hired by Cincinnati and one by Cochran [R383, P. 693: 9-23; R383, P.725:20 through P. 727:15; R385, P. 1038: 19-25; P. 1039: 1-8; P. 1041: 9-12; P. 1042: 2-17]. During the time of financial difficulty, Cochran told an employee that if business did not improve there would need to be a fire that would appear electrical with mainly smoke damage so that he would still have

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5. Prior to any determination of the cause of the fire, Respondent paid unto Cochran expenses incurred by him for the clean up of the property, security for the premises and payroll [R383, P. 719: 3-7] and also paid two mortgage holders for fire damage [R383, P. 761: 16-25; P. 717: 1-15].

the business but be able to get new inventory because the existing inventory was obsolete and Cochran could not sell it [R381, P. 249: 7-12]. Cochran inquired if this person knew someone to possibly burn the building [R381, P. 248:20-24]. Shortly thereafter, the fire occurred [R380, P. 196: 17-21].

Cochran testified that he was dropped off at his office by an employee on the night of the fire to get his wallet, that he was alone in the building at the time fire and that he actually retrieved his wallet. [R380, P. 202: 10-18; R380, P. 203: 10-25; P. 204: 1-7; R383, P. 729: 7-14; R383, P. 730: 11-23; R383, P. 729: 25; P. 730: 1-3, 20-22; R383, P. 732:1; R383, P. 735: 5-10; R383, P. 736: 1-10]. As Cochran entered the room where the fire originated, he slapped the light switch and immediately observed sparks below or behind a desk. [R383, P. 735: 5-10; R383, P. 735: 19-25; P. 736: 1-10]. This spark allegedly developed into a flame that quickly climbed the wall behind the computer desk [R383, P. 737: 10-13]. Cochran claimed it was an electrical fire which spread rapidly, which according to his own expert, could not occur in an electrical fire [R383, P. 737: 18-22 and R386, P. 1376: 20-25; 1377: 1-11]. Cochran also claimed he neither noticed anything suspicious nor did he smell smoke the entire time he was walking inside the building [R383, P. 733: 14-22; P. 738: 5-8]. Testimony from Cincinnati's experts indicated, based upon the soot built up on the light switch, that the switch had not been turned on at the time of the fire, contrary to Mr. Cochran's testimony. [R382, P. 477: 17-25; P. 478: 1-12].

Evidence also shows that there were large quantities of accelerant in the form of medium petroleum distillates in the building that were readily available for someone to use to set the fire [R380, P. 224: 22-25; P. 225: 1-14]. Cincinnati's experts and the Assistant State Fire Marshal, Hansen of the City of Mobile Fire Department, opined that the fire had multiple points of origin and was intentionally set by using medium petroleum distillates [R381, P. 326:17-23; P. 327:15-18; R382, P. 490: 7-24].

Additionally, Leonard Burroughs, a lay witness, who did not know Cochran, unsuspectedly came upon Cochran just when the fire became involved. [R380, P.125:14-18]. Burroughs drove past Foreign Auto, saw black smoke and rolling flames in the building of Foreign Auto and turned back around at the intersection to see if the business was actually on fire [R380, P. 118:15-20; 119:17-20; R380, P. 121:7-9]. Burroughs then saw Cochran coming toward him from a side street [R380, P. 120:7-10; R380, P.125:14-18]. Cochran would have had to exit the rear of his building (which he says he did – meaning he had to run through the building, pass a wall that was on fire to the rear of the building – rather than going out the front door which was a closer more direct path and walked through some woods behind several other businesses) in order to come out in the area of this side street [R383, P. 740: 21-25; P. 741: 1-13]. Burroughs asked Cochran if he knew the building was on fire and if he had called the fire department and Cochran indicated "yes" to both questions [R380, P. 121:17-19]. Burroughs testified that Cochran was sweating and was shocked to see him [R380, P. 122:18-21]. Burroughs observed Cochran walk about a block down the street away from the burning building and get into a truck that drove off away from the fire [R380, P. 121:19-23]. Although Cochran claimed that he ran from the building and down the street, Burroughs observed Cochran walking the entire time [R380, P. 121:11-14; R383, P. 742: 4-7].

Burroughs flagged down a police officer and advised what he observed and the police officer followed the truck Cochran was riding in as a passenger [R380, P. 123:21-25; P. 124:4-8]. The police officer turned on his lights to stop the truck [R380, P. 146:5-7]. The driver made two quick evasive maneuvers in order to avoid the police officer [R380, P. 146:8-20]. This was not only observed by the police officer but also testified to by driver who indicated that he turned down a street to see if the police were really after him [R380, P. 207: 25; P. 208: 1-7]. The truck was searched by the police and two cell phones were found

[R380, P. 148:22-25]. The cell phones belonged to Cochran and his business [R380, P. 205: 7-14]. Cochran was carrying one of the cell phones that night [R383, P. 745: 3-4]. Neither cell phone was used to call the police or the fire department [R383, P. 744: 21-25; P. 745: 1-7]. Even though the sole reason he went back to the office was to get his wallet, Cochran did not have his wallet when the police searched him [R380, P. 175: 1-9; R383, P. 735: 5-10].

The Mobile County Fire Department responded to the fire and commenced an investigation the same night. (R238, PP.7-8, ¶¶ 44, 50). The subsequent investigation by Fire Marshal Hansen determined multiple points of origin for the fire in the room of origin [R381, P.294:1-4, 15-22]. Test samples of carpeting taken by Hansen and previously taken by Fire Marshal Emmanuel Cook were tested by the Alabama Department of Forensic Sciences which tested positive for accelerant [R381, P. 396:21-23; P. 397:16-20; P. 398:6-9, 23-25; P. 399:10-12, 25; P. 400:3-8]. Hansen officially concluded the fire was intentionally set using an accelerant and not accidental. [R381, P. 326:17-23; P. 327:15-18].

Cincinnati hired a cause and origin expert, Harold Deese, who likewise found multiple points of origin [R382, P. 443: 15-25; P. 444: 1-9]. Deese determined, like Fire Marshal Hansen, that the burn patterns and multiple points of origin indicated the fire was intentionally set [R382, P. 490: 7-24]. Based upon their experience in investigating fires, both Hansen and Deese opined that this fire was incendiary rather than an electrical fire [R381, P. 326:17-23; P. 327:15-18; R382, P. 490: 7-24]. However, because Cochran interjected or attempted to interject a possible electrical cause, an electrical engineer, Owen Posey, was hired to investigate whether there was an electrical cause to the fire [R382, P. 608:25; P. 609:1-21]. Owen Posey determined that none of the electrical wiring, outlets, or equipment showed an electrical cause [R382, P. 626:1-8].

There was testimony that Cincinnati thoroughly investigated this claim and advanced payments pending its ultimate decision. Cincinnati rendered a decision once the claim was thoroughly investigated and all possible issues were properly considered [R383, P. 765: 18-25; P. 766: 1-6; P. 767: 8-17]. The claim file contained all the investigative and claim adjustment documentation compiled by Cincinnati over the course of the claim [R383, P. 753: 1-25; P. 754: 1-25; P. 755: 1-25; P. 756: 1-6].

Days after the fire, after various fire investigators, including Deese and Posey, had been to examine the scene and left, the Petitioners claim that Cochran and his best friend, while alone in the building, found a cord they believed showed the presence of an electrical short [R380, P. 1066:10-18; R385, P. 1201: 1-25; P. 1202: 1-25; P. 1203: 1-14]. The allegedly discovered cord was given to Petitioners' experts who claimed it showed evidence of an electrical short and could have been the cause of the fire. Cochran and his best friend did not turn this cord into the police or the fire department [R386, P. 1276: 1-25]. Petitioners' expert, Eleanor Posey (who was retained many years after the fire) also claimed that the cord showed evidence of shorting [R386, P. 1373:18-23; 1377:1-3]. However, Mrs. Posey testified that the fire could not have occurred as described in previous statements and testimony of Mr. Cochran [R386, P. 1375:16-21]. Electrical fires would not burn as rapidly as Mr. Cochran had indicated but rather would burn slowly [R386, P. 1376:20-25; 1377:1-11]. Mrs. Posey instead gave testimony that the arcing could have been going on for weeks, and contrary to Mr. Cochran's testimony, the fire could have actually been burning for up to an hour unnoticed by Cochran [R386, P.1378:24-25; 1379:1-4, 17-21]. Mrs. Posey testified it was possible that Cochran did not see the smoldering fire in the room of origin because the smoke was so heavy [R386, P. 1381:18-24]. This theory contradicts Mr. Cochran's trial testimony because he testified he did not see flames nor smell smoke when he entered the room [R383, P. 733: 14-22; P. 738:

5-8]. The Jury could easily find that Mrs. Posey's testimony was unbelievable and would defy common sense.

Testimony from Assistant Fire Marshal Hansen indicated the location where this wire supposedly shorted and caused the fire was really not in a point of origin [R381, P. 336:5-14; P. 371:17-25; P. 372:1-18]. Hansen testified there were separate, non-communicating areas of origin which was indicative of an intentional fire [R381, P. 294:21-25; 295:1822]. On cross-examination, Hansen was presented with various attacks on Owen Posey's electrical investigation as well as whether the scene had been spoiled [R381, P. 285:1-10]. Hansen testified he could render his opinion based upon the scene he found and the evidence collected. Hansen believed Owen Posey to be a credible, reliable source of information and expert with accurate determinations [R381, P. 283:7-25; P. 284:1-6 and 285:1-10].

Cochran also attacked Cincinnati's experts as well as the investigation by Cincinnati. This included presenting multiple theories such as the test results of Ms. Waters[6] showing medium petroleum distillates did not really show medium petroleum distillates [R382, P. 603: 9-18]. If the Jury did not buy that theory, Petitioners proffered the alternative theory that there were medium petroleum distillates all throughout the room due to tracking [R385, P. 1152: 19-25; P. 1153: 1-3; P. 1160: 24-25; P. 1161: 1-2].

Additionally, Petitioners also attempted to claim evidence was destroyed or altered[7] by Cincinnati, Deese or Posey

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6. Ms. Waters is a separate and independent forensic scientist with Analytical Forensic Associates who tested the samples taken by Deese which were submitted for independent analysis.

7. Petitioners claimed the fire scene was altered when certain electrical cords (inspected and discounted by Petitioners' experts as the cause of the fire) were removed by Deese to keep as evidence [R385, P. 1193:13-25; P. 1194:1-10]. Cochran had full knowledge of the removal of said items [R385, P. 1197:21-25; P. 1198:1-4]. Petitioners claimed

(Cont'd)

[R383, P. 814: 22-25; P. 815: 1-25; P. 816: 1-2].[8] The Jury obviously properly rejected these claims seeing through the hyperbolic, half truths, mis-characterizations, gamesmanship and rabbit trails.

Petitioners' Writ, under the section entitled "Evidence Excluded by the District Court" claims Petitioners proposed to offer certain evidence at trial regarding the actions and determinations of City of Mobile Fire Investigator Cook and Assistant Fire Marshall Dean but were denied the opportunity by the District Court. [Petitioners' Writ, p. 9]. This assertion is patently false and is not an issue properly before this Court. Petitioners failed to call Cook and Dean as witnesses at the trial of this matter and then tried to "call foul" in their Motion for New Trial before the District Court regarding alleged favorable testimony of Cook [R 358]. The District Court rejected Petitioners' argument given they had known of Cook's involvement for years, they had every right to call Cook as a witness but elected not to do so. [R 366]. Any assertion regarding said issue should be precluded from consideration.

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diagram symbols used in different reports were not consistent in meaning [R382, P. 502:19-25; P. 503:1-10]. No expert claimed that Respondent or anyone on Respondent's behalf spiked the fire scene with medium petroleum distillates [R301, P. 25; Ex. B, P. 234]. Further only Cochran was present, according to him, when the fire began [R383, P. 731:14-25; P. 732:1-16].

8. This included Petitioners claiming, during their closing argument, that an electrical receptacle on the north wall which has an "N" tag and is shown in different pictures was destroyed by Respondent [R387, P.1477:22-25; P. 1478:1-2, 6-7]. During her deposition testimony Eleanor Posey, Petitioners' expert, admitted she was in possession of the north wall receptacle, or at least its remains. Eleanor Posey testified she had been in possession of it for years and took possession of it from Petitioners' counsel, Stephen Tunstall [R361, Ex. 1, P.380-385 and Ex. 2]. This truth did not prevent Petitioners from arguing in their closing that Respondent destroyed the receptacle for some nefarious purpose [R387, P. 1477:11-25; P. 1478:1-9].

REASONS FOR DENYING THE PETITION

Rule 10 of the Supreme Court provides that a "review of a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons." *Id.* Further, Rule 10 states that a "petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of properly stated rule of law. *Id.* A review of a writ "will be granted only where there are special and important reasons therefore." *Omar v. Harvey*, 479 F.3d 1, 7 (C.A.D.C. 2007). Justice Renquist, in a dissenting opinion, admitted "[a] high degree of selectivity is thereby enjoined upon [the Supreme Court] in exercising [its] certiorari jurisdiction" and "Rule 10 embodies the standards by which we decide to grant review." *Hubbard v. United States*, 514 U.S. 695, 720 (1995).

Contrary to Petitioners' assertions the decision affirmed by the Court of Appeals in this case is not in conflict with decisions of other Court of Appeals regarding these issues. This writ amounts in substance to an argument by Petitioners that the trial court and the Court of Appeals misapplied proper evidentiary and procedural rulings. There exists no novel issue of law involving this case. While omitting relevant and prejudicial undisputed facts, Petitioners attempt to sensationally create a grand conspiracy (among the insurance company, the police, the fire officials, defense attorneys, experts and possibly judges) through the entirety of their undisputed facts and argument to erroneously lead this Court to grant their writ. The issues raised in the Writ are not of monumental importance to the masses which would trigger discretionary review by this Court. Petitioners are simply attempting to unseal the fate handed down by the jury and affirmed by the District Court and the Court of Appeals.

However, a review of the material, undisputed facts and law demonstrate that no such conflict or novel, important legal issue exists. The Eleventh Circuit, pursuant to the deference

standard, affirmed the District Court's striking of the malicious prosecution claim and under the abuse of discretion standard found that the exclusion of irrelevant evidence was not erroneous and declined to disturb the District Court's proper findings. There is nothing unreasonable, or even, unusual about the ruling of the District Court and the concurrence by the Court of Appeals. Lastly, the decision reached by the District Court and affirmed by the Court of Appeals in this matter is not one that has a broad implications or significance to the majority to invoke review by this Court.

A. The Decision of the Court of Appeals is Not in Conflict With Decisions of Other Courts of Appeal

The questions presented by Petitioners in its Writ assert two claims regarding the proper striking of the malicious prosecution claim; specifically, (1) deference should not be given to the district court's order striking the claim because the authoring judge was not the judge interpreting the prior order along with a contention that *post hoc* additions not originally included were made in interpreting the order, and (2) the timing in which the malicious prosecution claim was struck was improper.

Contrary to Petitioner's assertions, the decision of the Court of Appeals regarding the procedural issue is not in conflict with other courts of appeal. Respondent agrees with the cases cited in the Writ which supports the general rule that deference is accorded a district court's interpretation of its own order which is supported by the Second, Third, Fifth, Seventh and Eleventh Circuits (*United States v. Spallone*, 399 F.3d 415 (2nd Cir. 2005), *DirecTV v. Leto*, 467 F.3d 842 (3rd Cir. 2006), *Alabama Nursing Home Ass'n v. Harris*, 617 F.2d 385 (5th Cir. 1980), *United States v. Board of Educ.*, 717 F.2d 378 (7th Cir. 1983), *Cave v. Singletary* 84 F.3d 1350 (11th Cir. 1996) and *Commercial Union Ins. Co. v. Sepco Corp.*, 918 F.2d 920 (11th Cir. 1990)). Respondent; however, disagrees with Petitioners' use of a dissenting opinion and general quotes taken out of context from other courts of

appeal cases in an attempt to invoke this Court's review under the guise that other courts of appeal have rendered inconsistent rulings.

In this matter, it was not possible for the authoring judge (Judge Hand) to interpret his own order since the case had been re-assigned to another district judge; specifically, Judge Butler. It is the contention of Respondent that re-assignment of the case to another district judge is not sufficient basis to exclude the deference review standard. While *Spallone* does hold that "substantial deference" is given to the authoring judge in interpreting his own orders, *Spallone* nor any other case cited by Petitioners support the proposition that *no* deference is given to another judge's interpretation of a prior order entered by the issuing court. *Id.* "Court orders are constructed like other written instruments, except that the determining factor is not the intent of the parties, but that of the issuing court." *Spallone* at 399 F.3d 424. Court orders "must ordinarily be interpreted by examination of only the 'four corners' of the document." *Spallone*, 399 F.3d at 424. Further, deference is afforded a district court's interpretation of an order when said interpretation is reasonable. *Cave*, 84 F.3d 1354. The District Court properly struck the claim for malicious prosecution.

To resolve the dispute regarding the newly added factual allegations of conspiracy to the proposed pretrial order filed on January 23, 2004, the District Court allowed Petitioners limited leave to amend the counterclaims so as to clarify the nature of the allegations in connection with the counterclaim for conspiracy [R122]. Specifically, the District Court's order stated:

> [I]n light of the factual allegations made by [Petitioners] in the proposed pretrial order (Doc.120), in particular factual allegations in connection with [Petitioners'] counterclaim for conspiracy, the Court **hereby GRANTS** to [Petitioners] **LEAVE TO AMEND** their

> counterclaims (Doc. 87) so as to clarify the specific nature of their allegations.

[R122] (original emphasis). The key word used in Judge Hand's order is "clarify." Respondent asserts the word "clarify" means to free from confusion, to make understandable. Petitioners attempted to amend their counterclaim outside the scope of the District Court's Order which was a limited leave to amend [R 122]. Said Order was not an opportunity to add new claims to the existing counterclaim; Petitioners were simply allowed to "*clarify the specific nature of their allegations*." *Id.* Judge Butler, in reviewing all matters related to the order at issue, first found that Petitioners' only objection presented was of timeliness [R210] regarding Respondent's Motion to Clarify [R194]. Judge Butler rejected the timeliness argument as Petitioners cited a non-existent Local Rule and two FRCP rules which were not applicable to the issue presented by Respondent. [R 216, pgs. 1- 2, Petitioners' Writ, App. B]. Judge Butler further noted that Petitioners' objection "did not claim that Judge Hand intended to grant leave to add a malicious prosecution claim." [R216, p. 2, FN1; Petitioners' Writ, App. B]. Lastly, Judge Butler found that the District Court granted leave to amend to clarify the specific nature of the factual allegations in the proposed pretrial order and

> [g]ranting permission to clarify factual allegations is not equivalent to granting permission to add counterclaims. Moreover, [the District Court's] order contemplated that the amendments would be based on the proposed pretrial order which makes no mention of malicious prosecution. While there is some overlap between the allegations related to the conspiracy claim and the late-added malicious claim, a key element of malicious prosecution (termination of the underlying action in factor of the party seeking recovery) could not have occurred until after the proposed order was filed on January 23, 2004.

[R216, p. 2, FN1; Petitioners' Writ, App. B]. It was clearly within the purview of the District Court to strike the purported claim as the addition was not a clarification but an amendment. Further, at the time the proposed pretrial order was jointly filed by the parties, a claim for malicious prosecution was not ripe for adjudication.[9] Judge Butler's review of Judge Hand's prior order was not a cursory review nor was it a departure of the accepted and usual course of judicial proceedings. Judge Butler's interpretation of Judge Hand's order did not change the intent of or rewrite Judge Hand's prior order nor did it add *post hoc* language which was not originally included in Judge Hand's order. While a district court is not permitted to add provisions to an order that were not there originally, deference will be provided to a district court's reasonably interpretation of a prior order. *Cave*, 84 F3d. 1354 and *Dudley ex rel. Estate of Patton v. Penn-America Ins.*, 313 F3d 662 (2nd Cir. 2002).

The striking of the malicious prosecution counterclaim was not arbitrary but a reasonable interpretation of Judge Hand's order. In exercising its discretion, there are "usually a range of choices" a district court "may make and still be affirmed; there is not only one right choice for the court to make." *Blasland, Bouck & Lee, Inc. v. City of North Miami*, 283 F.3d 1286, 1298 (11th Cir. 2002) (*see also In re Rasbury*, 24 F.3d 159, 168 (11th Cir. 1994)). Respondent contends that in reviewing the language of Judge Butler's order, it is apparent the District Court took into consideration not only the wording and context of Judge Hand's prior order, but also the reasoning which supported the limited leave to amend the counterclaims to clarify the specific

9. It is irrelevant that Cochran's criminal case was dismissed three days prior to the pretrial conference. Cochran's criminal conviction had not been set aside on January 23, 2004, when the parties filed their jointly prepared proposed pretrial order with the District Court. [R120]. Even if Petitioners' factual allegations contained in the proposed pretrial order included allegations of malicious prosecution, said claims were not ripe for adjudication and due to be stricken. [R123, p.13]. Further, Petitioners' subsequent Motion for Leave to Amend to add various counterclaims was denied. [R172].

nature of the allegations, the motion to clarify and the motion to strike. After three scheduling orders, discovery cutoffs and trial settings [R15, R28 and R84], a review of the procedural history of the issues involved and the arguments made, the District Court, within its discretion, properly struck the newly added malicious prosecution claim as such claim exceeded the scope of District Court's order. After the passing of numerous procedural events and Respondent's objection to Petitioners additional factual allegations in the jointly filed Pretrial Report which were not previously plead, the District Court allowed Petitioners leave to clarify the nature of their claims; specifically the conspiracy claims. Petitioners, in the opinion of the District Court, tried to take such limited leave to clarify as an unbridled license to add completely new claims to the case which had been pending for approximately six years in which numerous deadlines to amend had already expired. As the procedural history of the case demonstrates, Petitioners had ample time to amend their counterclaims and assert all valid claims. The District Court's order was not an opportunity to reopen the case to claims never plead before at such late stage in the lawsuit. Respondent contends the District Court had the discretionary right to maintain control of this case and to rein in Petitioners' behavior in light of the various discovery abuses[10] so as to move this case to a conclusion in the interests of judicial economy.

Based on the foregoing, the Court of Appeals properly afforded deference to the District Court's reasonable interpretation of the order striking of the malicious prosecution claim and found no erroneous departure from the accepted and usual course of judicial proceedings.

Petitioners also claim it was improper for the District Court to strike the malicious prosecution claim that was filed 8 months earlier with no objection posed by Respondent. The District Court found that Petitioners had exceeded the authority of the Court's prior order by adding the malicious prosecution claim and commented that 'this sleight of hand went undetected for a

10. See footnotes 2 and 3 above.

period of months, and now [petitioners] allege it is too late for the Court to do anything about it." [Petitioners' Writ, App. B]. The District Court found that Respondent's failure to bring the discrepancy to the Court's attention sooner was unimportant and understandable:

> The attorneys who had represented [respondent] since the beginning of this lengthy litigation were forced to withdraw when [petitioners] named them as conspirators in the February 2004 counterclaims. Since [respondent's] current counsel was not involved in the Pretrial Conference before Judge Hand, the discrepancy would not have been readily apparent to them. Moreover, [respondent's] counsel have not been sitting idly by these past few months, given the activity in this case.

[Petitioners' Writ, App. B]. Lastly, the District Court held that it had the inherent authority to enforce its own orders. Said ruling is consistent with the case law presented above that a District Court's interpretation of its own order will not be disturb unless said interpretations was not reasonable. The decision rendered by the District Court and affirmed by the Court of Appeals should stand undisturbed.

B. Petitioners Have Failed to Assert that there is a Conflict Amongst the Courts of Appeal regarding the Exclusion of Evidence of the Alleged Prior Bad Acts of Deese

First and foremost, Petitioners have failed to assert a valid ground to trigger this Court's review of the evidentiary ruling of the District Court and the affirmation by the Court of Appeals. Further, Petitioners' Writ is void of any legal analysis to establish a conflict amongst the other circuits on this issue or any other basis articulated in Supreme Court Rule 10.

Petitioners have also failed to establish that the District Court erred in precluding evidence of Harold Deese allegedly tampering with the Spread Lounge and Chickasaw, AL fire

scenes in 1986 and 1991, respectively. Additionally, Petitioners failed to establish that the District Court improperly excluded evidence related to Attorney John Richardson's supposed knowledge concerning Deese's alleged illicit activity in 1986. Since the District Court clearly acted within the bounds and scope of the Federal Rules of Evidence and applicable case law, the Court of Appeals, pursuant to an abuse of discretion standard, affirmed the District Court's ruling. This Court should uphold the evidentiary rulings with respect to this issue.

On November 4, 2004, Respondent filed a motion *in limine* with respect to the 1984 Spread Lounge fire [R240]. Respondent sought to preclude alleged evidence that Deese tampered with the fire scene; whether Attorney Richardson knew whether Deese tampered with the scene; and, whether Richardson directed Deese to tamper with the fire in this case on appeal. The Petitioners *failed* to file a response to Respondent's motion.

On March 7, 2005, the District Court, after giving Petitioners approximately four months to file a response, entered an order granting, in part, Respondent's motion as related to either Deese or Richardson's involvement in the Spread Lounge fire [R276]. However, it stopped short of precluding the admissibility of evidence proving Richardson directed Deese to tamper with the fire scene. It stated such evidence was admissible, *if such evidence exists* [R276, p. 2].[11] The District Court noted that no response had been filed to Respondent's Motion *in Limine*.

On March 10, 2005, Petitioners filed an objection to Respondent's Motion *in Limine* Regarding Expert Harold Deese Previously Altering a Fire Scene. [R281]. However, since the District Court had already ruled on the Motion *in Limine* , the objection was actually a Motion to Reconsider. In the motion, Petitioners argued against precluding evidence related to the Spread Lounge fire and how Deese tampered with the fire scene

11. Cochran failed to present any evidence at trial that Richardson directed Deese to tamper with the fire scene as none existed.

[R281, P. 1-4; 5-17]. Additionally, Petitioners included new evidence of the second fire in Chickasaw, AL with fresh allegations of Deese's alleged illicit activity and Attorney Richardson's alleged involvement in same [R281, P. 4-5].

Once again, on March 9, 2005, Petitioners filed a Motion to Amend the Pretrial Order; this time, to include new witnesses and evidence related to the Chickasaw, AL fire [R282]. Said relief was sought after having already filed three amended counterclaims, four separate discovery disclosures, the first pretrial order and after the actual discovery cutoff had passed.

On March 23, 2005, Respondent filed a motion *in limine* with respect to the Chickasaw, AL fire; responded to Petitioners' Motion to Reconsider; and, Objected to Petitioners' Motion to Amend the Pretrial Order to include newly discovered evidence [R286]. Respondent noted the Court already ruled on the inadmissibility of the Spread Lounge fire; that the evidence supporting the belief that Deese altered the 1991 Chickasaw fire scene was unsubstantiated and that the fire itself was not temporally related to the instant action; finally, that Petitioners' motion to amend was untimely and failed to provide any authority to substantiate the sought after relief.

Respondent filed a response to the Motion *in Limine* regarding the Chickasaw, AL fire [R289]. Petitioners essentially adopted by reference their Motion to Reconsider previously filed [*Id.*]. Additionally, Petitioners attached as an exhibit the complaint for declaratory judgement related to the 1991 Chickasaw, AL fire [R289, Ex. A]. Neither party to that complaint were parties to this action.

On April 14, 2005, the District Court entered an order [R296]. The Court stated that because Petitioners raised a FRE 404(b) argument with respect to the Spread Lounge fire it would reconsider its ruling. However, the Court found that Petitioners failed to meet the 404(b) prior bad act admissibility standard set forth in *U.S. v. Cancilliere*, 69 F.3d 1116, 1124 (11th Cir. 1995). Similarly, the Court found that Petitioners failed to meet

the *Cancilliere* standard with respect to the Chickasaw, AL fire. Hence, the District Court affirmed its prior ruling on the inadmissibility of the Spread Lounge fire and granted Respondent's Motion *in Limine* with respect to the Chickasaw, AL fire.

As raised in opposition to the appeal below, the first issue is whether Petitioners have a right to raise the issue on appeal whether the District Court erred in precluding evidence of the Spread Lounge fire after they had not timely raised an objection to Respondent's Motion *in Limine*. [R240]. "[W]e note that as a general rule, the failure of a litigant to make timely objections to alleged errors in the proceedings or to rulings by the court waives those objections for purposes of appeal unless the error is so 'fundamental as to result in a miscarriage of justice'." *Lee v. Dallas County Bd. of Edu.*, 578 F.2d 1177, 1179 (5th Cir. 1978).

Based on the District Court's April 14, 2005 Order [R296], the only issue that survived the District Court's March 7, 2005 Order [R276] was whether the District Court should have allowed evidence of the Spread Lounge fire based upon the exceptions listed in FRE 404(b). Moreover, said issue was treated as a Motion to Reconsider, as the Court noted that an Order had been entered with respect to the inadmissibility of the Spread Lounge fire, but had not considered same under the 404(b) exceptions. Nonetheless, the Court affirmed its prior ruling upon consideration of the merits [R296]. Petitioners now bring this issue on appeal with respect to the admissibility of evidence related to the Spread Lounge fire.

The rulings by the District Court and the Court of Appeals regarding the Spread Lounge fire should be upheld. *Medley v. Westpoint Stevens, Inc.*, 162 F.R.D. 697 (M.D. Ala. 1995) sets forth the applicable law regarding a Motion to Reconsider:

> A motion to reconsider is properly brought to correct a clear error in the court's interpretation of either the facts or law. Rule 59(e) Fed. R. Civ. P. It should

> be used in order to prevent manifest injustice, however, it is an extreme measure, and substantial discretion rests with the court in granting such a motion. E.g., *O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir.). ("The decision to alter or amend a judgment is committed to the sound discretion of the district court").

Id. at 698.

The District Court has an enormous amount of discretion as to whether it should vacate a prior ruling. This Circuit has elaborated on one of the practical purposes of the abuse of discretion standard:

> Inherent in this [abuse of discretion] standard is the firm recognition that there are difficult evidentiary rulings that turn on matters uniquely within the purview of the district court, which has first-hand access to documentary evidence and is physically proximate to testifying witnesses and the jury.

Tran v. Toyota Motor Co., 420 F.3d 1310, 1315 (11th Cir. 2005). (Citing *United States v. Jernigan*, 341 F.3d 1273, 1285 (11th Cir. 2003). Here, the record clearly reflects that this Court should defer to the District Court's ruling.

The District Court, citing *United States v. Veltmann*, 6 F.3d 1483, 1498 (11th Cir. 1993) stated "[e]xtrinsic evidence that a witness committed crimes, wrongs, or other acts in the past is not admissible to prove that he acted similarly on a subsequent occasion." The District Court conceded that evidence of a witness's other crimes or wrongs may be admitted for other purposes under FRE 404(b) but set out its analysis of why Petitioners' argument failed. Petitioners claimed the purpose of the evidence was to prove knowledge and absence of mistake. The District Court first found that Petitioners failed to identify the alleged knowledge "that should be imputed to [respondent] or the issue to which that knowledge is relevant." [R296, p. 2;

Petitioners' Writ, App. E]. The District Court also opined that Petitioners simply listed various actions of Deese allegedly done during his investigation to support their absence of mistake argument; however, Petitioners failed to explain 'why the specifics of the prior acts make it more likely that specific actions in this case were not due to mistake." [R296, pgs. 23; Petitioners' Writ, App. E]. Lastly, in further examining the potential admissibility under 404(b), the District Court found that the alleged evidence of prior wrongs was disputed and that the "prejudicial effect of such evidence far outweighs its probative value." [R296, p. 3; Petitioners' Writ, App. E]. After careful consideration, the District Court properly excluded the evidence as it failed to meet the exceptions stated in FRE 403 under *Cancilliere* and lacked any impeachment value under FRE 608(b).

Said decision was not based simply on the predicate that Deese's alleged illicit investigation would have to result in a criminal conviction in order to be admissible, as presented in Petitioners' argument.[12] To the contrary, the District Court had ample reason to preclude evidence of the Spread Lounge fire. First, Deese was neither arrested nor convicted as a result of his investigation of the Spread Lounge fire. In fact, the investigating officer admitted that he never had probable cause to even arrest Deese [R240, P. 3]. Moreover, the investigator was ordered to cease his investigation of Deese and was removed entirely from the investigation by his own supervisors [R240, P. 3]. There was no evidence to suggest this was done by Respondent, Attorney Richardson and/or Deese.

12. In their appeal to the Eleventh Circuit, Petitioners included new facts to support their argument, namely that Attorney Richardson shut down Maddox's investigation to protect Deese from prosecution and Petitioners have included said insinuation in their Writ before the Court [Petitioners' Writ, p. 8]. This fact was of first impression before the Court of Appeals and should be precluded from consideration in this matter. Moreover, said theory lacks any supporting evidence, is merely speculation, and amounts to an accusation of obstruction of justice. There is nothing in the record to support this libelous statement.

Further, the allegations made against Deese with respect to the Spread Lounge fire vastly differ from the allegations made in the instant appeal. There, one investigator suspected Deese of possibly spiking a fire scene with gasoline to give the scene the false appearance of arson (the government's fire investigators had actually ruled the fire an arson based on evidence collected prior to Deese's arrival at the scene) [R240, P. 3]. Here, Deese was never accused of such conduct. Additionally, Deese has vigorously maintained that he neither removed any evidence from Petitioners' shop nor mislabeled the points of origin [R382, P. 538:23 through P. 540:14; P. 556:23-25; P. 557:5]. The 1986 allegation was never substantiated and Petitioners failed to substantiate any alleged impropriety on the part of Deese at the trial of this matter [R240, P. 3].

There is also no causal connection between Respondent and the Spread Lounge fire. Respondent was simply never a party connected to the Spread Lounge fire and there is no evidence that Respondent was even aware of Deese's involvement in same [R240, P. 4-5]. Further, the Spread Lounge fire took place in 1986, approximately twelve years prior the fire in the instant appeal took place [R240, P. 4]. Finally, the Spread Lounge fire was labeled arson prior to Deese's involvement, which begs the question of how he could be suspected of impropriety in the first place [R240, P. 5].

The relationship between the Spread Lounge fire and the instant action was completely remote in both scope and time, the District Court properly precluded evidence of same. The Court of Appeals concurred with the ruling of the District Court hence this Court should affirm the lower court's ruling on this matter.

The second issue is whether the District Court erred in precluding the evidence related to the Chickasaw, AL fire. Again, Respondent states that the District Court's ruling is due to be affirmed. The District Court went through a reasoned analysis why Petitioners' objection to Respondent's Motion *in Limine*

lacked merit. Namely, their objection and reasons to include the evidence did not meet the *Cancilliere* standard. Petitioners failed to state specifically how Deese's alleged prior bad acts related to his actions in the instant action prove absence of mistake, and attempted to offer completely inadmissible proof of coincidence because Deese has ruled arson in, "70-80% [sic] of the fire scenes he investigate[d]. . . ." [R296, p. 3], which essentially and inappropriately states that Deese rubber-stamps fire scenes.

However, the District Court did not stop its analysis with the first part of the test in *Cancilliere*. The District Court continued in its analysis under the remaining two prongs and determined the evidence was inadmissible under any part of the test. While Petitioners argue the District Court failed to note their objection to the preclusion of the evidence in light of its breach of contract, bad faith and conspiracy claims, Respondent notes that the insurance company at issue in the Chickasaw fire was The Hartford Insurance Company, who was not a party to this action R286, P. 6]. Petitioners presented no evidence that Respondent had knowledge of these accusations against Deese.

Moreover, Petitioners failed to produced any evidence of either probable cause, an investigation, or the arrest and conviction of Deese for any alleged illegal activity as related to the aforementioned fire. There was simply a disagreement of information provided by Deese to the Chickasaw, AL arson investigator. [R286, P. 3-4]. There is no evidence showing that Deese either altered or spiked the fire scene, and Deese vigorously opposes such false innuendos [R286, P. 3, 5].

The Court of Appeals noted in its opinion that it had "carefully studied the voluminous record on this issue in this appeal." [Petitioners' Writ, App. A]. *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512 (1997) sets forth the proper standard of review with respect to evidentiary rulings: "We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings." *Id.* at 141, 118 S. Ct. at

517. (Citing *Old Chief v. United States*, 519 U.S. 172, 174 n. 1, 117 S. Ct. 644, 647 n. 1 (1997); *United States v. Abel*, 469 U.S. 45, 54, 105 S. Ct. 465, 470 (1984). Additionally, the Court noted the grounds mandating the reversal of a District Court's evidentiary rulings: "[c]ases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is *manifestly erroneous*." *Id.* at 142, 118 S. Ct. at 517. (Citing *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879)).

It is plainly evident the District Court's rulings were not manifestly erroneous. Its rulings were grounded in sound reasoning and logic under the Federal Rules of Evidence and applicable case law. Petitioners propounded no meritorious argument why the District Court's rulings should be reversed, as the court set forth several grounds underlying why the evidence was precluded from the record. "When a district court has discretion, there are usually a range of choices it may make and still be affirmed; there is not only one right choice for the court to make." *Blasland, Bouck & Lee, Inc. v. City of North Miami*, 283 F.3d 1286,1298 (11th Cir. 2002). *See also In re Rasbury*, 24 F.3d 159, 168 (11th Cir. 1994). The District Court provided several sound reasons why the evidence related to the Spread Lounge and Chickasaw, AL fires were due to be precluded. The rulings were not manifestly erroneous. Thus, this Court should adopt and affirm the District Court's determination that the evidence was properly due to be precluded and the Court of Appeals subsequent concurrence.

Petitioners claim that in affirming the exclusion of the evidence, the Court of Appeals rubber-stamped the District Court's ruling by providing

> no analysis, failed to address any 404(b) issues and simply concluded that the evidence 'was not relevant under Fed.R.Civ.Evid. 401 in the present case, would unduly prejudice [Respondent] under Fed.R.Evid.

403, and failed to meet the exceptions stated in Fed.R.Evid. 403.'

[Writ, p. 28]. Petitioners; however, have failed to provide any legal citations to support their contention that because the Court of Appeals affirmed the lower court's ruling without any detailed analysis or lengthy discussion that said affirmation is an erroneous conclusion of law.

CONCLUSION

Petitioners have wholly failed to submit any evidence and/or case law to satisfy the requisite criteria to trigger this Court's granting review of the Writ of Certiorari. Petitioners have failed to demonstrate inconsistent decisions amongst the Court of Appeals as to the procedural issue presented and absolutely no legal basis to support this Court's review under Supreme Court Rule 10 as to the evidentiary issue presented. Based upon the foregoing, Petitioners' Writ of Certiorari is due to be denied.

Respectfully submitted,

MICHAEL B. BEERS
WILLIAM F. PATTY*
ANGELA TAYLOR BAKER
BEERS, ANDERSON, JACKSON,
PATTY, VAN HEEST & FAWAL, P.C.
P.O. BOX 1988
Montgomery, Alabama 36102
(334) 834-5311

Counsel for Respondent

* *Counsel of Record*